

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

WAYNE SZYMBORSKI, On Behalf of ) 3:10-CV-00132-ECR-RAM  
Himself and All Others Similarly )  
Situated. )

Plaintiff, ) Order

vs.

11 ORMAT TECHNOLOGIES, INC., YEHUDIT )  
11 BRONICKI, JOSEPH TENNE, )  
11 )  
12 Defendants. )

Defendants.

13 PAUL STEBELTON, On Behalf of ) 3:10-CV-00156-ECR-RAM  
14 Himself and All Others Similarly )  
Situated. )

Plaintiff,

vs.

18 ORMAT TECHNOLOGIES, INC., JOSEPH )  
TENNE, YEHUDI BRONICKI, YORAM )  
BRONICKI, LUCIEN Y. BRONICKI, DAN )  
19 FALK, JACOB J. WORENKLEIN, ROGER )  
W. GALE, ROBERT F. CLARKE, )

Defendants.

22 JOHN J. CURTIS, On Behalf of )  
Himself and All Others Similarly )  
23 Situated, )

Plaintiff,

25 | vs.

26 ORFORMAT TECHNOLOGIES, INC., JOSEPH )  
TENNE, YEHUDI BRONICKI, )  
27 )

## Defendants.

1 This case is a class action suit against Ormat Technologies,  
2 Inc. ("Ormat") and individual officers of Ormat ("individual  
3 Defendants") for violations of federal securities laws.

4 On August 13, 2010, Defendants filed a motion to dismiss (#43)  
5 the consolidated amended class complaint (#35). On September 27,  
6 2010, Plaintiffs opposed (#50). On November 3, 2010, Defendants  
7 replied (#53).

8 The motion is ripe, and we now rule on it.

## I. Background

11        In March and April 2010, three lawsuits were filed alleging  
12 violations of federal securities laws against Ormat and individual  
13 officers of Ormat. On June 3, 2010, the Court consolidated (#27)  
14 the actions and appointed Plaintiffs Jianxun Dong, George Umino, and  
15 the A.R.D. Investment Club, L.P. (the "Lead Plaintiffs") lead  
16 plaintiffs.

17 Ormat is a Delaware corporation engaged in the geothermal and  
18 recovered energy power business. (Am. Class Compl. ¶¶ 2, 17 (#35).)  
19 Plaintiffs are purchasers (the "Class") of Ormat's securities  
20 between May 7, 2008 and February 24, 2010, inclusive (the "Class  
21 Period"). (Id. ¶ 1.)

22 Plaintiffs base their complaint on two separate incidents in  
23 which Defendants allegedly misled stockholders and purchasers. The  
24 first incident concerns Ormat's February 24, 2010 disclosure that  
25 Ormat's financial statements for 2008 required restatement. The  
26 second incident concerns Ormat's projections regarding the timely  
27 completion and expected capacity of the North Brawley plant.

1       Ormat, as part of its geothermal and recovered energy power  
 2 business, explores, identifies, develops, and operates new  
 3 geothermal projects. (Id. ¶¶ 17-18.) In 2007, Ormat discussed  
 4 geothermal projects at Grass Valley, Buffalo Valley, and Rock Hills  
 5 in its public disclosures. (Id. ¶¶ 21, 23.) Both projects were  
 6 located in Lander County, Nevada. (Id.) Ormat also disclosed other  
 7 exploration sites in Nevada. (Id. ¶ 23.)

8       In its 2007 Form 10-K, Ormat informed investors that costs  
 9 incurred in connection with the exploration and development of  
 10 geothermal resources would be capitalized on an "area-of-interest"  
 11 basis. (Id. ¶ 33.) It also represented that when an area of  
 12 interest is abandoned, capitalized exploration costs would be  
 13 expensed. (Id.) Ormat also stated that "[t]o date, we have not  
 14 abandoned any exploration projects." (Id.) In its 2008 Form 10-K,  
 15 Ormat repeated its disclosures regarding costs of exploration, but  
 16 removed the sentence stating that exploration projects had not been  
 17 abandoned. (Id. ¶ 34.) The Buffalo Valley, Grass Valley, and Rock  
 18 Hills Projects were abandoned in 2008, but the costs were  
 19 capitalized rather than expensed. (Id. ¶ 57.) On February 24,  
 20 2009, Ormat issued a press release titled "Ormat Technologies  
 21 Reports Record Fourth Quarter 2008 and Year-End results" reporting  
 22 increases in net income and earnings per share. (Id. ¶ 66.)

23       On September 14, 2009, the Securities and Exchange Commission  
 24 ("SEC") sent Ormat a letter questioning, *inter alia*, Ormat's method  
 25 of capitalizing costs on an area of interest basis. (Id. ¶ 54.) In  
 26 a series of emails, Ormat explained that "[t]here are no geothermal-  
 27 specific industry accounting standards or guidance" and that it

1 adopted the full-cost method used in the oil and gas industry  
2 described in Rule 4-10 of Regulation S-X, Financial Accounting and  
3 Reporting for Oil and Gas Producing Activities Pursuant to the  
4 Federal Securities Laws and the Energy Policy and Conservation Act  
5 of 1979 and Statement of Financial Accounting Standards ("SFAS") No.  
6 19 rather than the successful-efforts method. (Id. ¶¶ 55-56, 59.)  
7 Ormat was asked to clarify if an area of interest is the level at  
8 which projects were tested for impairment, which the SEC noted  
9 "could result in the poor performance of certain exploration  
10 projects being masked by the strong performance of other exploration  
11 projects within the same area of interest . . . [which would be]  
12 important information for your management to know." (Id. ¶ 58.)  
13 Ormat responded by stating that it treats Nevada as a single cost  
14 center, as used by companies following the full cost method, and  
15 Nevada is further divided into three areas of interest. (Id. ¶ 59.)  
16 Ormat explained that it defines an area of interest "based on the  
17 geographical proximity of the geothermal resources and their  
18 proximity to the same electricity grid, the use of, in certain  
19 cases, a common transmission line . . . " to "reflect the manner in  
20 which [Ormat] intend[s] to operate [its] power plant facilities."  
21 (Id.)

22 On February 11, 2010, the SEC wrote that it "[did] not believe  
23 it is appropriate to analogize to full cost accounting." (Id. ¶  
24 62.) The SEC noted that "ASC 932 (formerly SFAS 19) and Rule 4-10  
25 of Regulation S-X specifically exclude geothermal activities from  
26 their scope." (Id.) Ormat was asked to restate its financial  
27 statements to write off all abandoned projects and to reflect the  
28

1 expense in the period in which the project was abandoned,  
2 "consistent with the guidance in ASC 360-10-35." (Id.) The SEC  
3 also requested that Ormat expand its disclosures concerning its  
4 exploration and development projects, including discussions of  
5 projects that were abandoned during each period. (Id.) Ormat was  
6 also asked to discuss its capitalization of costs. (Id.) Ormat  
7 agreed to restate its financial statements, to expense costs for  
8 abandoned projects, and to clarify its disclosures to investors.  
9 (Id. ¶ 63.)

10 During a conference call with investors on February 24, 2010,  
11 Ormat stated that it would now use the successful efforts method.  
12 (Id. ¶ 65.) On the same day, Ormat also issued a press release  
13 titled "Ormat Technologies Reports Record 2009 Year End and Fourth  
14 Quarter Results." (Id. ¶ 84.) Ormat stated in the press release  
15 that through the third quarter of 2009, Ormat accounted for  
16 exploration and development costs using a full cost accounting  
17 method under which it capitalized costs incurred for exploration and  
18 development on an area of interest basis. (Id.) Ormat further  
19 stated that following a review performed by the SEC, it concluded  
20 that its accounting method was in error, and restatement would be  
21 necessary. The effect of the restatement on the 2008 financial  
22 statements was that net income decreased by \$6.2 million. (Id.)

23 Following the disclosures made on February 24, 2010, Ormat's  
24 shares declined \$1.28 per share, nearly 4%, on February 24, 2010,  
25 and further declined an additional \$0.89 per share, nearly 3%, on  
February 25, 2010, and declined another \$2.08 per share on February  
26, 2010. (Id. ¶ 86.)

1 Plaintiffs allege that the financial disclosures made before  
 2 February 24, 2010, were knowingly or recklessly misleading because  
 3 using the full cost method was improper and a violation of generally  
 4 accepted accounting principles ("GAAP"), and because the accounting  
 5 policy as disclosed to investors was unclear or purposefully  
 6 erroneous as to the actual accounting method that was used. (Id. ¶¶  
 7 71, 73, 76, 79, 83.)

8 Plaintiffs further allege that a strong inference of scienter  
 9 arises from the fact that Ormat is a family-owned corporation that  
 10 was defending against a hostile takeover attempt by Gazit, Inc., and  
 11 because the individual Defendants needed high dividends in order to  
 12 pay off a \$157 million loan made to purchase additional Ormat shares  
 13 in order to defend against the hostile takeover attempt. (Id. ¶¶  
 14 102-103, 105-106.)

15 The second incident Plaintiffs rely on to support their claims  
 16 are Defendants' disclosures concerning Ormat's North Brawley plant.  
 17 (Id. ¶ 120.) Ormat began exploration activities in North Brawley,  
 18 California in Imperial County in 2006. (Id.) In a press release on  
 19 December 21, 2006, Ormat announced that "[d]evelopment of the North  
 20 Brawley geothermal project is expected to be completed in 50-MW  
 21 clusters over a three to five years period, with the first 50 MW  
 22 coming online by the end of 2008 at the earliest." (Id. ¶ 121.)

23 Ormat continued to make statements that the North Brawley plant  
 24 was on track to be completed by the end of 2008. (Id. ¶ 123.) Due  
 25 to problems with sand and injection interference issues, however,  
 26 the North Brawley plant was not put into service until February  
 27 2010, at a capacity of 17 MW. (Id. ¶ 143.)

1 Before Ormat developed the North Brawley plant, Southern  
2 California Edison constructed a 10MW experimental plant at North  
3 Brawley in 1980. (Id. ¶ 134.) The plant was decommissioned in 1986  
4 due to corrosion, reservoir uncertainties, and complications with  
5 the high salinity brines. (Id.) Plaintiffs allege that Ormat did  
6 not disclose Southern California Edison's failure with the North  
7 Brawley plant, and that Ormat developed the North Brawley plant on  
8 what it later confessed to be a "very aggressive completion  
9 schedule" in order to receive a tax subsidy which could only be  
10 claimed on the electricity output of new geothermal power plants put  
11 into service by December 31, 2008. (Id. ¶¶ 129, 139.) Plaintiffs  
12 also present a confidential witness statement to support its claims  
13 that Defendants knew that their statements concerning the status of  
14 the North Brawley plant were false. (Id. ¶¶ 138-39.)

15 Plaintiffs claim that during the Class Period, Plaintiffs and  
16 the Class "purchased Ormat's securities at artificially inflated  
17 prices as a result of the materially false and misleading statements  
18 alleged" in the complaint, and that as a result, Plaintiffs and the  
19 Class incurred damages. (Id. ¶ 189.)

## II. Motion to Dismiss Standard

22 Plaintiffs' claims are brought under Sections 10(b) and 20(a)  
23 of the Exchange Act, as well as under Rule 10b-5 of the Rules and  
24 Regulations of the Exchange Act, 17 C.F.R. § 240.10b-5. Therefore,  
25 the claims are subject to the heightened pleading standards of  
26 Federal Rule of Civil Procedure 9(b) and the Private Securities  
27 Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b).

1 Federal Rule of Civil Procedure 9(b) provides that "[i]n alleging  
 2 fraud or mistake, a party must state with particularity the  
 3 circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b).  
 4 The PSLRA also provides that "a complaint shall specify each  
 5 statement alleged to have been misleading, the reason or reasons why  
 6 the statement is misleading" and should also state "with  
 7 particularity all facts" on which any allegation rests, including  
 8 any allegations regarding scienter. 15 U.S.C. § 78u-4(b). The  
 9 court must dismiss complaints that do not meet these requirements.  
 10 15 U.S.C. § 78u-4(b)(3).

11 The United States Supreme Court recently clarified the standard  
 12 by which a court must consider a Rule 12(b)(6) motion to dismiss a  
 13 Section 10(b) action. Tellabs, Inc. v. Makor Issues & Rights, Ltd.,  
 14 551 U.S. 308, 322 (2007). First, a court must accept all factual  
 15 allegations in the complaint as true. Id. Second, a court must  
 16 also consider the complaint in its entirety, as well as other  
 17 sources such as "documents incorporated into the complaint by  
 18 reference, and matters of which a court may take judicial notice."  
 19 Id. Third, in determining whether a plaintiff has sufficiently pled  
 20 scienter, a court "must take into account plausible opposing  
 21 inferences." Id.

22

23 III. Analysis

24 "Five elements are required in order to prove a primary  
 25 violation of Rule 10b-5. In particular, a plaintiff must demonstrate  
 26 (1) a material misrepresentation or omission of fact, (2) scienter,  
 27 (3) a connection with the purchase or sale of a security, (4)

1 transaction and loss causation, and (5) economic loss.'" Zucco  
 2 Partners, LLC v. Digimarc Corp., 552 F.3d 981, 990 (9th Cir. 2009)  
 3 (quoting In re Dao Systems, Inc., 411 F.3d 1006, 1014 (9th Cir.  
 4 2005)). Defendants seek to dismiss Plaintiffs' claims in their  
 5 entirety pursuant to the PSLRA and Federal Rules of Civil Procedure  
 6 9(b) and 12(b) (6) for failure to plead, with the requisite  
 7 particularity, material misrepresentation, scienter, and loss  
 8 causation.

9 Plaintiffs' claims rest on two separate allegedly misleading  
 10 disclosures made by Defendants during the Class Period. We will  
 11 consider the allegations relating to each incident separately.

12 A. Ormat's 2008 Restatement

13 Plaintiffs claim that Ormat's choice of the full cost  
 14 accounting method was not only improper, but also misleading because  
 15 it resulted in overstated financial results. Plaintiffs also claim  
 16 that Defendants' disclosures regarding the actual accounting method  
 17 used were misleading and vague, and gave investors the impression  
 18 that costs would be expensed when a project was abandoned.<sup>1</sup>

19 Plaintiffs also plead, as they must, that Defendants acted with  
 20 the requisite intentional or reckless scienter in making the  
 21 allegedly misleading disclosures. Plaintiffs base their allegation  
 22 of scienter on Defendants' need to defend the company against a  
 23 hostile takeover. Plaintiffs' theory is that Defendants required

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24  
 25 <sup>1</sup> Defendants assert that Plaintiffs did not make this claim in  
 26 their complaint, and improperly tried to add it in their opposition  
 27 to Defendants' motion to dismiss. We disagree. In the complaint,  
 Plaintiffs state that Defendants' method of capitalizing expenses for  
 abandoned projects "was not in compliance with its accounting policy  
 as disclosed to investors." (Am. Class. Compl. ¶ 94 (#35).)

1 significant dividends in order to reduce the balance of the \$157  
2 million loan taken to aid in Defendants' efforts to defend against  
3 the takeover. Under that theory, Defendants would have been under  
4 pressure to create profits under which a large dividend would not  
5 look suspicious, as Defendants were not in a position to sell Ormat  
6 shares to repay the loan due to the looming pressure of the hostile  
7 takeover.

8 Plaintiffs have pled, with sufficient particularity,  
9 allegations to support a claim based on the allegedly deceptive and  
10 improper accounting method used to account for costs incurred in  
11 exploration. The allegedly misleading statements are identified,  
12 along with reasons explaining why each statement is misleading. The  
13 allegations relating to scienter are likewise sufficient. Taken as  
14 a whole, and individually, Plaintiffs' claim that Defendants had a  
15 particular motive to mislead investors is at least as plausible as  
16 any opposing inference of innocence. While Defendants argued that  
17 their choice of the full cost accounting method was not plainly  
18 erroneous in light of the lack of an industry standard, and similar  
19 practices by other geothermal companies, Defendants fail to respond  
20 to Plaintiffs' claim, supported by the SEC's own comments in their  
21 letters to Ormat, that the full cost accounting method is  
22 specifically excluded as an appropriate accounting method for  
23 geothermal companies. Therefore, the scale tips in favor of an  
24 inference that Ormat or the individual Defendants intentionally or  
25 recklessly chose the allegedly improper full cost accounting method  
26 to bolster Ormat's year-end profit reports for improper reasons.

27

28

## B. Timeliness and Output of the North Brawley Plant

2 Plaintiffs' allegations regarding Ormat's statements about the  
3 North Brawley plant, however, do not pass muster under the  
4 heightened pleading standard in the PSLRA. Under the PSLRA,  
5 "forward-looking statements" are protected by a safe harbor under  
6 certain circumstances. The PSLRA provides that a person shall not  
7 be liable with respect to any forward-looking statement, written or  
8 oral, if the statement is "(i) identified as a forward-looking  
9 statement, and is accompanied by meaningful cautionary statements  
10 identifying important factors that could cause actual results to  
11 differ materially from those in the forward-looking statement." 15  
12 U.S.C. § 78u-5(c). The PSLRA also protects forward-looking  
13 statements if a plaintiff fails to prove that the statement was made  
14 with actual knowledge that the statement was false or misleading, or  
15 if made by or with the approval of an executive officer of a  
16 business entity. Id.

17 The PSLRA defines forward-looking statements to mean, *inter*  
18 *alia*, statements of the plans and objectives of management for  
19 future operations. Ormat's statements that the North Brawley plant  
20 was scheduled for completion at the end of 2008 with an output of  
21 50MW falls squarely under the definition of forward-looking  
22 statements protected under the PSLRA's safe harbor, and were  
23 identified as such due to the use of language such as "we expect"  
24 and "subject to change at any time and which may not be met in its  
25 entirety." Those statements are, therefore, protected under the  
26 safe harbor as long as they were accompanied by "meaningful  
27 cautionary statements identifying important factors that could cause

1 actual results to differ materially from those in the  
2 forward-looking statement[s]." 15 U.S.C. § 78u-5(c). A company's  
3 "[f]ailure to include the particular factor that ultimately causes  
4 the forward-looking statement not to come true will not mean that  
5 the statement is not protected by the safe harbor." 1995  
6 U.S.C.C.A.N. 679, 743. Plaintiffs allege that Ormat's projections  
7 concerning completion date and capacity were false because of  
8 problems with sand in the geothermal reservoir and interference  
9 between injection wells. Ormat accompanied its forward-looking  
10 statements with cautionary language that warned of exactly such  
11 risks. For example, Ormat warned its stockholders that its  
12 development schedule is "subject to change at any time and which may  
13 not be met in its entirety" due to risks such as geothermal energy  
14 projects "suffer[ing] an unexpected decline in the capacity of their  
15 respective geothermal wells" as well as other operational risks  
16 "relating to the extraction of geothermal fluids." (2008 Form 10-K,  
17 Exhibit 3, Motion to Dismiss, at 3-4. 44-61, 69-72 (#45-1).) Ormat  
18 further warned that completion of the project is subject to risks  
19 such as "shortages and inconsistent qualities of equipment, material  
20 and labor; and adverse environmental and geological conditions . . .  
21 which could give rise to delays, cost overruns . . . ." (Id.)

22 The statute itself protects forward-looking statements as long  
23 as the requirement of cautionary language is met. 15 U.S.C. §78u-  
24 b(5). The second prong of the safe harbor, the requirement of  
25 actual knowledge of falsity is independent. See id. (safe harbor  
26 protects forward looking statements accompanied by meaningful  
27 cautionary language, or when plaintiff fails to prove actual

1 knowledge of falsity). Because we rule that the forward-looking  
 2 statements were accompanied by meaningful cautionary language, we do  
 3 not examine the argument that the statements are protected under the  
 4 second prong of actual knowledge.<sup>2</sup>

5 Plaintiffs, however, argue that many of Ormat's statements  
 6 regarding the North Brawley plant were statements of current  
 7 business conditions rather than future projections. Plaintiffs  
 8 claim that Ormat's statements were equivalent to statements that a  
 9 company is "on track" to meet its goals. The authority on whether  
 10 statements that a company is "on track" are forward-looking  
 11 statements is split, with no binding precedent on this Court. There  
 12 are decisions favorable to Plaintiffs' position that "on track"  
 13 statements are not forward-looking statements. See, e.g., In re  
 14 Secure Computing Corp. Securities Litig., 120 F.Supp. 2d 810, 818  
 15 (N.D. Cal. 2000). The Court of Appeals for the Third Circuit  
 16 disagrees. The Third Circuit held that statements that the company  
 17 is "on track" and that its first quarter results "position [it]" to  
 18 meet its goals "cannot meaningfully be distinguished from the future  
 19 projection of which they are a part." Institutional Investors Group  
 20 v. Avaya, Inc., 564 F.3d 242, 255 (3d Cir. 2009).

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22 <sup>2</sup> Some courts disagree. See, e.g., In re SeeBeyond Tech. Corp. Sec. Litig., 266 F.Supp. 2d 1150, 1164 (C.D. Cal. 2003) (holding that knowledge of actual falsity will negate any safe harbor protection). The majority of courts, however, hold that the two prongs of the safe harbor are independent. See, e.g., Harris v. Ivax Corp., 182 F.3d 799, 803 (11th Cir. 1999) (noting that "if a statement is accompanied by 'meaningful cautionary language,' the defendants' state of mind is irrelevant."). The majority reading of the statute is consistent with the legislative history. See H.R. Conf. Rep. 104-369, at 44 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 743 ("[t]he first prong of the safe harbor requires courts to examine only the cautionary statement accompanying the forward-looking statement.")

1       While Plaintiffs and Defendants strenuously advocate their  
2 respective positions, our scrutiny of the complaint leads to the  
3 conclusion that the issue being argued does not actually exist in  
4 this case. Ormat did not, at any time, state expressly that it  
5 was "on track" to meet its goal of completion by 2008. Rather, the  
6 challenged statements are statements such as "construction work is  
7 at an advanced stage" and "[d]rilling started in February 2007." On  
8 November 6, 2008, Defendant Yehudit Bronicki also stated that "the  
9 50 megawatt North Brawley Project is in final stages of  
10 construction" and that "[w]e expect to complete these activities by  
11 the end of 2008." Other than the last statement about expecting to  
12 complete the plant by 2008, these statements are not equivalent to a  
13 general statement that a project is on time, and are not protected  
14 as forward-looking statements because they are statements of current  
15 fact. Plaintiffs argue that these statements were misleading  
16 because Ormat failed to disclose that construction was not on  
17 schedule due to issues with sand and having to re-drill wells.  
18 Plaintiffs also argue that Ormat failed to disclose the problems  
19 other companies faced trying to develop the North Brawley plant  
20 decades earlier. In fact, Ormat made no further statements about  
21 the North Brawley plant after its November 2008 disclosures until  
22 February 25, 2009, when Ormat disclosed the existence of sand issues  
23 that caused the initial delay. On that day, Defendant Yehudit  
24 Bronicki stated that "[w]e also substantially completed the  
25 construction of the 50 megawatts north Brawley and expect a gradual  
26 ramp up of the project with full capacity in the second quarter of  
27 2009." Defendant Bronicki also stated that the slow ramp up is due

1 to unexpectedly large quantities of sand within the geothermal  
2 reservoir.

3 Plaintiffs present three sources of evidence to support their  
4 allegation that Ormat's statements about the status of the North  
5 Brawley plant were intentionally or recklessly misleading or false.  
6 The three sources of evidence are Southern California Edison's  
7 experimental North Brawley plant built in 1980, a confidential  
8 witness statement, and Ormat's own statements made during an April  
9 9, 2010 presentation. We will consider each of these separately.

10 Plaintiffs allege that Southern California Edison's ("SCE")  
11 experimental plant constructed in 1980 supports their allegations  
12 against Ormat because Ormat did not disclose the failure of SCE's  
13 plant, and because Ormat should have known, due to SCE's experience,  
14 that the North Brawley plant was subject to many risks and therefore  
15 would be difficult to complete on schedule with an output of 50 MW.  
16 We disagree. While SCE did face problems that resulted in  
17 decommissioning the experimental plant in 1986, Ormat points out  
18 that technology has advanced since the 1980s, and SCE itself signed  
19 a contract to purchase power from the North Brawley plant, thereby  
20 supporting the inference that SCE did not think that its prior  
21 experience necessarily meant Ormat would face insurmountable  
22 problems in delivering on its promise to complete the North Brawley  
23 plant by 2008. Nor was Ormat's failure to disclose SCE's prior  
24 experiments on the same general location indicative of scienter to  
25 mislead its investors. Companies are under no obligation to  
26 disclose information already in the public domain. See Whirlpool  
27 Financial Corp. v. GN Holdings, Inc., 67 F.3d 605, 609 (7th Cir.

1 1995). Plaintiffs stated in the class complaint that "[b]ased on  
2 public records of Ormat leases and well sites in North Brawley"  
3 Plaintiffs believe that Ormat's North Brawley plant is located close  
4 to the abandoned SCE plant site. Plaintiffs do not allege, at any  
5 time, that the information concerning North Brawley was not readily  
6 available to them, and do not cite where they obtained their  
7 information about the site. Nor did they have any response in their  
8 opposition to Defendants' motion to dismiss. Therefore, we conclude  
9 that the information regarding SCE is in the public domain, and  
10 Ormat's failure to specifically disclose that information cannot  
11 give rise to a fraud claim for failure to disclose.

12 We will consider Ormat's own statements following the delays  
13 before considering the confidential witness statements. On March 2,  
14 2009, Ormat provided more details on the North Brawley plant in its  
15 2008 Form 10-K. Ormat stated that "[c]onstruction of the project  
16 was substantially completed in December 2008. During the start-up  
17 testing we have encountered larger quantities of sand in the  
18 geothermal reservoir than initially expected, which required  
19 modification of the power plant." Ormat's statements do not strike  
20 us as a *mea culpa*. Ormat candidly explained that "[the sand  
21 problem] is not something surprised us [sic] and originally we  
22 installed sand separators which were suppose [sic] to take care of  
23 this problem . . . ." Ormat stated then, as it reiterates now  
24 through its motion to dismiss, that it was expecting issues with the  
25 sand that it thought would be adequately remedied, and the  
26 difficulty in solving the problems did not become apparent until  
27 after final construction when it attempted to start up the plant in  
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1 December 2008. Ormat's statements, therefore, do not support an  
 2 inference that Ormat deliberately or recklessly misled its investors  
 3 regarding the risks surrounding its projected 2008 completion date  
 4 for the North Brawley plant.<sup>3</sup>

5 The third source of evidence Plaintiffs present is that of a  
 6 confidential witness. A complaint relying on statements from a  
 7 confidential witness must pass two hurdles to satisfy the heightened  
 8 pleading requirements of PSLRA. Digimarc, 552 F.3d at 995. First,  
 9 the confidential witness "must be described with sufficient  
 10 particularity to establish [his] reliability and personal  
 11 knowledge," and the statements by a confidential witness "must  
 12 [himself] be indicative of scienter." Id. The first prong is only  
 13 required if there is no additional evidence providing an adequate  
 14 basis for believing that the defendants' statements were false. Id.  
 15 In this case, we ruled that the other sources of evidence provided  
 16 by Plaintiffs do not provide an adequate basis for believing that  
 17 Defendants' statements regarding North Brawley were false.  
 18 Therefore, Plaintiffs must satisfy both requirements relating to  
 19 confidential witness statements.

20 Here, the confidential witness ("CW#1") was not an employee of  
 21 Ormat, but was instead "employed by a company contracted to lay  
 22

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23 <sup>3</sup> Plaintiffs also allege that Defendants admitted that they  
 24 proceeded on a very aggressive schedule in order to receive a tax  
 25 break if the project was completed by 2008. We do not believe that  
 26 the statement about an aggressive schedule supports a claim of  
 27 fraudulently misleading investors. Defendants' statements and actions  
 support a more compelling inference that Defendants expected and hoped  
 to complete the North Brawley plant by 2008, but encountered problems  
 in the start-up phase that ended in delay and a disappointing  
 capacity.

1 electrical conduit lines for the wells from February 2008 through  
2 September 2008" working as a "scheduler handling project-cost  
3 controls." (Am. Class Complaint ¶ 138 n. 3 (#35).) According to  
4 the complaint, CW#1 "left the company he was working for while the  
5 project was ongoing." Plaintiffs acknowledge that CW#1 was not  
6 involved with drilling or testing wells, but claim that he was  
7 familiar with the extent of the delays because "as an electrical  
8 contractor, the delays were a big deal for the contractor."  
9 According to Plaintiffs, CW#1 had incentive to track Ormat's  
10 "progress and slippage closely" because of the contract between  
11 CW#1's company and Ormat, which included terms for liquidated  
12 damages if the contractor missed certain milestones. Finally,  
13 Plaintiffs conclude that "by September 2008 Ormat had fallen  
14 increasingly behind on well drilling and construction, as CW#1  
15 indicated that only approximately a third of the wells had been  
16 installed."

17 Plaintiffs claim that CW#1's account is independently  
18 corroborated by information available about wells drilled by third-  
19 party drilling companies. According to Plaintiffs, those records  
20 "indicate that Ormat faced significant problems with drilling in the  
21 summer of 2008, causing delays far beyond what is normal."  
22 Plaintiffs rely on the fact that three wells "took unusually long to  
23 complete." (Am. Class Compl. ¶ 139 (#35).)

24 We conclude that the confidential witness statements presented  
25 here "do not present a cogent and compelling inference of scienter."  
26 Digimarc, 552 F.3d at 999. CW#1 is not an employee of Ormat, nor  
27 does CW#1 allege to have had any direct contact with Ormat

1 management or any of the individual Defendants. The most CW#1 can  
2 hope to prove is that Ormat was not "on track." Even that inference  
3 is far from ironclad. CW#1 left his company in September 2008, and  
4 therefore cannot attest to whether Ormat managed to finish drilling  
5 its wells and enter start-up in December 2008 as Ormat has claimed.  
6 Nor do Plaintiffs present any sort of evidence corroborating their  
7 claim that the alleged delays in drilling wells meant Ormat was  
8 substantially and irreversibly behind on its construction schedule  
9 in September 2008. They merely assert that some available data  
10 indicated that Ormat took a considerable amount of time drilling  
11 three wells, but acknowledge that the usual time frame for well  
12 drilling is sixteen days. Plaintiffs fail to provide evidence  
13 through CW#1 that Ormat intentionally lied when it announced that  
14 construction was advanced or in its final stages. Therefore, we  
15 find that CW#1 satisfied neither prong of reliability required under  
16 Digimarc and the PSLRA.

17 Plaintiffs have failed to provide evidence that supports an  
18 inference that Defendants' statements concerning the North Brawley  
19 plant were false or misleading, and that they were made with the  
20 requisite scienter. Therefore, Plaintiffs' claims based on Ormat's  
21 statements that the construction was in its final stages, or other  
22 such statements of current fact, must be dismissed. Furthermore,  
23 Ormat's forward-looking statements concerning the completion date  
24 and capacity of the North Brawley plant are protected under the  
25 PSLRA's safe harbor, and therefore cannot form the basis of a  
26 securities fraud claim.

27

28

#### IV. Conclusion

2 Plaintiffs' allegations based on the 2008 Restatement plead  
3 with sufficient particularity that Defendants' statements were  
4 intentionally or recklessly misleading, and shall not be dismissed.  
5 Plaintiffs' allegations based on Ormat's statements regarding the  
6 North Brawley plant, however, shall be dismissed. Ormat's  
7 statements that the North Brawley plant was expected to be completed  
8 by 2008 with a capacity of 50 MW were forward-looking statements  
9 protected by the PSLRA's safe harbor. Ormat's statements regarding  
10 the advanced stage of construction of the North Brawley plant at the  
11 end of 2008 are likewise insufficient to form the basis of a  
12 securities fraud claim because Plaintiffs have not provided  
13 compelling evidence that the statements were false or made with the  
14 requisite scienter.

16       IT IS, THEREFORE, HEREBY ORDERED that Defendants' Motion to  
17 Dismiss (#43) is GRANTED IN PART AND DENIED IN PART on the following  
18 basis: Plaintiffs' allegations based on Ormat's statements regarding  
19 the North Brawley plant shall be dismissed, and Plaintiffs'  
20 allegations based on the 2008 Restatement shall not be dismissed.

23 DATED: March 3, 2011.

—Edward C. Reed.

UNITED STATES DISTRICT JUDGE